United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

Orig. w/affidavit of mailing

75-1182

To be argued by
PAUL B. BERGMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1182

UNITED STATES OF AMERICA,

Appellee,

—against—

MONTE JOYNER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
Assistant United States Attorney,
Of Counsel.

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TABLE OF CASES

United States Court of Appeals

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UNITED STATES OF AMERICA,

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BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant Monte Joyner appeals from a judgment of the United States District Court for the Eastern District of New York (Bramwell, *J.*), entered on April 7, 1975, which judgment convicted appellant of violating 18 U.S.C. § 1708. Previously, appellant had pleaded guilty to a one count information (appellant had waived indictment) charging that he knowingly possessed a stolen United States Treasurer's check in the amount of $284.80 on August 12, 1974. The appellant is currently incarcerated at Riker's Island under a state court sentence imposed in January of this year. Judge Bramwell's sentence, three years imprisonment, will run concurrently with the state sentence. Thus, when appellant is released from state custody, he will be required to serve the remainder of his federal term.

On this appeal appellant requests that this case be remanded for resentencing before a different district court

judge. He claims that the sentence was excessive and that the reasons it was excessive are twofold: (1) the district court improperly relied upon an arrest of appellant in 1973 based upon a charge that he possessed a loaded firearm even though the charges were eventually dismissed; and (2) that the tenor of the probation report was biased against him. In brief, we believe that appellant's claims are without foundation. The transcript of sentencing shows that Judge Bramwell expressly forsook any reliance on the 1973 arrest. Second, we believe that it is a proper function of a pre-sentence report to offer the sentencing court an expert subjective analysis of a defendant, even though "[s]uch reports are often uncomplimentary to a defendant, . . ." *United States* v. *Needles*, 472 F.2d 652, 654 (2d Cir. 1973).

Statement of the Case

A. Appellant's Criminal Conduct.

The facts concerning the criminal conduct which gave rise to the instant prosecution are not in dispute. As outlined in the pre-sentence report, a copy of which will be made available to each member of the panel at the time of oral argument, appellant acknowledged that in the late summer of 1974, he and others engaged in a fencing operation of stolen credit cards and Government checks and bonds. Thus, on three separate occasions in August, 1974, appellant sold 10 United States Treasurer's checks having a total value in excess of $2,600 for $250 cash[1]. Those illegal sales were made to an undercover officer of the New York City Police Department. Thereafter, in September, appellant sold to the same undercover officer several credit cards and four $25 United States Savings Bonds. For those sales, appellant received a total of $176.

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[1] On August 4, 1974, he sold four U.S. Treasurer's checks having a total face value of $834.95 for $100. On August 12, he sold five additional checks totalling $1,548 for $125. Finally, on August 13, he sold one check in the amount of $217.25 for $25.

In September, appellant was arrested on both Federal and State charges. Subsequently, on January 14, 1975, appellant was sentenced by New York State Supreme Court Justice Thomas Agresta, based upon his plea to reduced charges, to a sentence of one year imprisonment. Appellant was committed to Rikers Island where he had been held by the State on those charges since October 31, 1974.

On February 19, 1975, appellant disposed of the Federal charges by pleading guilty to a felony information (appellant had waived indictment) charging him with the unlawful possession of just one of the 10 stolen Treasury checks. At the time that appellant pleaded guilty, it was acknowledged by the Assistant United States Attorney in charge of the prosecution that the Government would not "prosecute Mr. Joyner for any Federal offenses arising out of his sale of Treasury checks or savings bonds which were sold by him to undercover Police Officers . . ." (Transcript of February 19, 1975, p. 8). Thereafter, following his acknowledgement of guilt, appellant stated that he understood the maximum penalty could be as much as a $2,000 fine and a sentence of 5 years in prison (*id.*, at p. 13).

B. Sentencing Proceedings.

On April 7, appellant appeared before District Judge Henry Bramwell for sentencing. Prior thereto, a 14 page pre-sentence report had been prepared and in addition, counsel for appellant, as well as others, had written letters on appellant's behalf.[2]

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[2] It should be noted that despite appellant's counsel's continual reference to the so-called "rap sheet" compiled by the F.B.I., there is no indication whatever in the record that that document was before Judge Bramwell or that the United States Attorney's Office, which customarily obtains copies of defendant's arrest records for its own file, had made available that record to the Court.

The pre-sentence report, in addition to outlining the facts concerning appellant's criminal conduct, stated that, according to appellant, he had become involved with stolen checks and the like because his expenses exceeded his financial abilities (see pages 4-5 of pre-sentence report). More than one full page of the pre-sentence report was devoted to appellant's record which began in May of 1959 when he was adjudged a youthful offender based upon his possession of marijuana.[3] Thereafter, the probation report tabulates appellant's five additional convictions spanning the years from 1963 to 1971. In addition, the pre-sentence report shows that in 1973, appellant was arrested for possession of loaded firearms but that those charges were dismissed shortly after the arrest. The remaining three entries on the tabulation dealt with appellant's criminal involvement in the check cashing scheme.[4]

At the sentencing, counsel for appellant explained to the District Judge that appellant's course of criminal conduct, which had extended over 10 years, stopped when he was serving a prison term at the Clinton State prison and that following his release from Clinton, he voluntarily enrolled himself in a methadone clinic in order to rid himself of the heroin habit which had been the cause of his prior criminal conduct (see Transcript of April 7, 1975, pp. 4-6). Counsel then went on to explain that for the period of two years between appellant's release from prison and his arrest on these charges "he [appellant] was working to straighten himself out . . . he was employed . . . was heroin free and he had gotten himself an apartment and a car" (*id.*, at

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[3] At the sentencing (p. 11), counsel stated that the pre-sentence report mistakenly stated that the conviction was for heroin. No issue was taken with counsel's representation.

[4] It should be noted that the tabulation compiled by the probation office is more complete than the "rap sheet" in that, with one exception (petit larceny arrest of February 9, 1969) it contains the disposition of all the charges against appellant.

p. 7). Thereafter, when he was no longer employed, counsel explained that appellant's debts remained and that he then resorted to the conduct for which he was eventually arrested. Counsel described appellant as "desperate . . . to keep what he had earned for himself" (*id.*, at p. 8).[5]

Counsel's allocution lasted for some six and a half pages of recorded transcript and repeated much of what had been said in counsel's letter sent to the Court in March (see Appendix for Appellant, C, "Sentence Letter"). During the course of the allocution, while acknowledging that the appellant had committed "petty burglaries" (*id.*, at p. 4), counsel made a passing statement that his client had not committed any violent crimes "in the service of his habit" (*id.*, at p. 5), and also that appellant was a "non-violent person." Thereafter, counsel implied that, for the past two years, if one discounted his instant criminal involvement, appellant, because he was "heroin free and non-addicted" (*id.*, at p. 12), was in the course of full rehabilitation. Judge Bramwell interjected and stated that on August 14, 1973, in the middle of that period of rehabilitation, appellant had been arrested for assault and possession of loaded firearms. The Court acknowledged that the charges had been dismissed and then inquired of counsel "are you still telling me this man is non-violent since then?" Counsel then represented to the Court that appellant was not guilty of that crime and the Court thereafter made no further comment whatever on the subject of the gun charge. Indeed, the Court expressly stated that it understood that the gun charges were dismissed.[6] Nevertheless, alluding to

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[5] Counsel did not assert that appellant's criminal activities in this case were due to drug addiction.

[6] The record is clear that Judge Bramwell completely discounted the arrest on the gun charges. Thus, he expressly stated that the fact of the arrest "[d]oes not mean he did it. I agree with you [defense counsel] 100 percent. I agree with that 100 percent, the fact that he was charged never means he did it. All I can look at are his convictions, . . ." (Transcript of April 7, 1975, p. 14; see also p. 13).

the extensive record of convictions (as Judge Bramwell phrased it, appellant had a "history, he has a history"), the Court stated (*id.*, at p. 13):

> "Each year, almost, there is some type of situation where he is involved in crime and for you to stand up here and say this man is bringing himself back, it's not so.
>
> It's not so on this type of a situation. I give you every right to talk for your client and say anything you want, but when I see a record like this and you stand up and give me laudatory phrases as to what this man's position is, it's inconsistent with what he's doing."

When counsel interjected his personal belief that there was no such inconsistency, Judge Bramwell noted: "That's the difference between you and me, the complete difference."

Thereafter, following further remarks by counsel, Judge Bramwell sentenced appellant to a prison term of three years and directed that it run concurrently with the one year sentence which had been imposed by Justice Agresta.[7]

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[7] In an effort undermine the district court's sentence in this case, appellant has implied that Judge Bramwell, in sentencing him to a concurrent 3 year term, had not realized that the federal term would begin to run only as of April 7, the day of sentencing and not retroactively to October, 1974 when appellant was incarcerated on the State charges (Brief, p. 11). Counsel, of course, is entirely correct when he states that the period of concurrence does not begin to run until April 7. Nevertheless, as the correspondence attached to this brief shows, it was Judge Bramwell's intention to see that appellant served at least two and a half years under the federal sentence.

ARGUMENT

The sentencing procedures employed in this case were in all respects proper.

Appellant's principal contention is that Judge Bramwell, in pronouncing sentence, improperly relied on the 1973 dismissed charge of assault and possession of loaded firearms to belie counsel's statement that appellant was non-violent and his claim that appellant had been rehabilitated following his release from prison in 1972.

We do not understand, from a reading of the sentencing minutes, how counsel for the appellant can claim, where the court repeatedly announced its adherence to the presumption of innocence concerning the dismissed charge and acknowledged several times its reliance solely on the record of prior convictions, that the court presumed the appellant's guilt from an arrest for assault and possession of a weapon and the subsequent dismissal of the charges. Rather, the dismissed charge was never considered by Judge Bramwell. As such, because there was no reliance on the dismissed charge, there is no need to consider the application of the principle announced in *United States* v. *Tucker*, 404 U.S. 443 (1972).[8] See *United States* v. *Needles*, 472 F.2d 652,

[8] We note, nonetheless, that hearsay has been declared to be within the pale of the court's consideration. *Williams* v. *Oklahoma*, 358 U.S. 576 (1959) as well as evidence of crimes committed for which a defendant was never charged. *United States* v. *Cifarelli*, 401 F.2d 512, 514 (2d Cir.), *cert. denied*, 393 U.S. 987 (1968). Moreover, consideration of crimes of which a defendant has been acquitted has been deemed within the province of the court, *United States* v. *Alkins*, 480 F.2d 1223, 1224 (9th Cir. 1973); *United States* v. *Sweig*, 454 F.2d 181, 184 (2d Cir. 1972), as have charges against the defendant that have been dismissed. *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.), *cert. denied*, 343 U.S. 843 (1965); *United States* v. *Metz*, 470 F.2d 1140, 1141-1142 (3d Cir. 1972), *cert. denied, sub. nom. Davenport* v. *United States*, 411 U.S. 919 (1973). All potentially bear relevance as to the character and history of the defendant before the

[Footnote continued on following page]

658 (2d Cir. 1972); *United States* v. *Brown*, 479 F.2d 1170, 1173-74 (2d Cir. 1973). Simply put, appellant's arrest in 1973 was not "counted against" him as a "pejorative" factor. *United States* v. *Schwarz*, 500 F.2d 1350, 1351 (2d Cir. 1974).

Moreover, it is perfectly clear from this record that Judge Bramwell, in considering appellant's continuous course of criminal conduct from 1969 through 1974, did not consider appellant's brief hiatus from crime as the mark of rehabilitation, even though appellant was drug-free. Indeed, because appellant was no longer addicted when he committed the 1974 crimes, Judge Bramwell could properly have discounted whatever ameliorative consideration he might normally have given to the supposedly drug induced crimes committed by appellant in the past. Instead, he could properly have concluded that appellant was an habitual criminal irrespective of whether he was addicted. We note facetiously that, in order to reach that conclusion, it was not necessary for Judge Bramwell to rely upon the 1973 charge.

Appellant's final contention is that the probation department's pre-sentence report, submitted to Judge Bramwell, contained erroneous subjective assertions, was negatively biased, and portrayed an inaccurate presentation of appellant's character.

Court. *Tucker*, which was designed to prevent erosion of the Sixth Amendment rights secured by *Gideon* v. *Wainright*, 372 U.S. 335 (1963) by reliance on constitutionally invalid convictions, is therefore distinguishable. Involved in *Tucker* were constitutional infirmities that led to materially untrue assumptions about the defendant's criminal past. Rather, given a defendant with a massive record of convictions, it is the kind of information that would simply round out such a defendant's character and propensities. See, *United States* v. *Majors*, 490 F.2d 1321, 1324 (10th Cir. 1974).

We note at the outset that counsel for the appellant was provided with the opportunity to controvert contended errors at the sentencing proceeding. In addition, counsel for the appellant submitted, a few weeks before sentencing, a rather lengthy pre-sentence report of his own setting forth the unfortunate aspects of appellant's upbringing, as well as his subjective assertions as to appellant's self-rehabilitative progress. See *United States* v. *Rosner*, 485 F.2d 1213, 1230 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974).

Against this background, appellant makes several contentions. He argues that the probation department's report tried to create the impression that his disclaimer of out-of-wedlock fatherhood was a falsehood. However, even if this contention is correct, the court acknowledged that no attention was being paid to it. (See Transcript of April 7, 1975, at p. 12). Second, counsel argues that the report's assertion as to appellant's unemployment since arrest was another negative implication; that appellant had been incarcerated since arrest. The fact is that appellant lost his job as a carpenter's apprentice in August of 1974. He remained unemployed and returned to his pattern of criminal behavior. Furthermore, he was arrested on September 28, 1974, but was not incarcerated at Riker's Island until October 31, 1974. Counsel finally argues that the report's assertions that Mr. Joyner (1) ". . . failed to profit from his previous incarcerations;" (2) that he ". . . appears shrewd and manipulative," and (3) that he ". . . has not recognized his own shortcomings" are baseless and subjective assertions. However, counsel's claims as to appellant's rehabilitation are surely as subjective, especially in light of his reversion to a life of crime when the slightest of pressures were evident. Given his record of five previous convictions it is not baseless to conclude as the report, concluded, that appellant failed to profit from previous incarcerations or that he has failed to recognize his own shortcomings.

Due process of the law was not violated in this sentencing proceeding. Judge Bramwell placed no reliance on the 1973 arrest, and it can hardly be said that he rendered sentence on anything less than an informed discretion and on a proper factual foundation.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: July 2, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
Assistant United States Attorney,
*Of Counsel.**

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* The United States Attorney's Office wishes to acknowledge the assistance of Burton S. Weston in the preparation of this brief. Mr. Weston is a third year law student at New York University School of Law.

APPENDIX

Letter dated June 17, 1975 to Judge Bramwell from Paul B. Bergman

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

ADDRESS REPLY TO
UNITED STATES ATTORNEY

AND REFER TO
INITIALS AND NUMBER

PBB:lf
F. #751616

HAND DELIVERY

June 17, 1975

Honorable Henry Bramwell
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, N. Y. 11201

Re: United States v. Monty Joyner—74 CR 125
Court of Appeals Docket #75-1182

Dear Judge Bramwell:

Your Honor may recall that Mr. Joyner was sentenced on April 7, 1975. Previously Mr. Joyner had been sentenced in the state court, on a related crime, to a three year prison term, which term commenced in October, 1974. The federal sentence (a copy of the judgment and commitment has been enclosed herewith) was recommended to run concurrently with Mr. Joyner's state sentence.

Counsel for Mr. Joyner, in the brief on appeal, states (Br. 11):

> "The Court sentenced appellant to a 3 year prison term and ordered the term to run concurrent to the one year State sentence he was already serving. However, since appellant was on federal bail during his State incarceration from October, 1974 to April 7, 1975, the date of the federal sentence, appellant probably does not receive credit on his federal sentence for this State time served. The net result is that appellant will probably serve the one year State sentence after which he will be subject to an actual federal sentence of 2½ years."

We have been informed by the Bureau of Prisons that the sentence in this case will, in fact, be deemed to have commenced as of April 7 and not before then. Thus, counsel's statement is substantially correct. In order to prevent any misapprehension by the Court of Appeals in hearing this appeal, we believe that your Honor might wish to indicate if your intention was as counsel for appellant suggests. Conversely, if your Honor's intention was to begin the recommended period of concurrency as of the date of the state sentence, then, perhaps, a remand of this case for the limited purpose of resentencing and thereby effectuating your intent would be in order.

Very truly yours.

DAVID G. TRAGER
United States Attorney
By: /s/ PAUL B. BERGMAN
PAUL B. BERGMAN
Assistant U. S. Attorney
Chief, Appeals Division

Encl.
cc: Lawrence Stern, Esq.
11 Monroe Place
Brooklyn, N. Y. 11201

Letter dated June 18, 1975 to Paul B. Bergman from Judge Bramwell

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK 11201

CHAMBERS OF
HENRY BRAMWELL
DISTRICT JUDGE

June 18, 1975

Hon. David G. Trager
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201
Attention: Paul B. Bergman
Assistant U. S. Attorney

Re: United States v. Monty Joyner—74 CR 125
Court of Appeals Docket #75-1182

Dear Mr. Bergman:

I am in receipt of your letter of June 17, 1975. In order to prevent any misapprehension by the Court of Appeals in hearing this appeal, I would like to set forth my intention regarding sentencing of the defendant. It was my intention to recommend that the Federal sentence run concurrently with the previously imposed State sentence commencing as of the date of the Federal sentence, April 7, 1975, and *not* before that time.

Very truly yours.

/s/ HENRY BRAMWELL
HENRY BRAMWELL
United States District Judge

cc: Lawrence Stern, Esq.
11 Monroe Place
Brooklyn, New York 11201

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 2nd day of July, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF AND APPENDIX FOR APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Lawrence Stern, Esq.
11 Monroe Place
Brooklyn, N. Y. 11201

Evelyn Cohen

Sworn to before me this
2d day of July, 1975

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977

★ U. S. Government Printing Office 1975— 614—251—116

AKE NOTICE that the within
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his office at the U. S. Court-
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the ____ day of _____,
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d States Attorney,
ney for _____

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_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within
_____ is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-5M-8-73-7355